Supreme Court, U.S.
FILED
07104 2FEB 12 2008
OFFICE OF THE CLERK

No. 08-

IN THE

Supreme Court of the United States

PATRICK LETT,

Petitioner,

v.

UNITED STATES,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

During sentencing, the district judge committed legal error by improperly determining the statutory sentencing range. Soon thereafter (and within the narrow time window that Fed. R. Crim. P. 35 allows), the district judge recognized his legal error and, pursuant to Fed. R. Crim. P. 35(a), imposed a proper sentence according to the instructions of 18 U.S.C. § 3553(a). The Eleventh Circuit reversed, holding that the district judge's initial misunderstanding of the applicable sentencing range did not constitute "other clear error" under Rule 35. This case thus gives rise to the following two questions:

1. Does a judge's admitted misunderstanding of his statutory sentencing authority constitute "other clear error" to permit that judge to correct a legally erroneous sentence under Federal Rule of Criminal Procedure 35(a)?

2. If a circuit court finds that a sentencing error does not qualify as "clear error" for purposes of Rule 35, can the circuit court order the district court to impose a sentence the district court determined to be legally erroneous without itself first considering whether that sentence was in fact erroneous?

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PETITION FOR A WRIT OF CERTIORARI

Patrick Lett respectfully petitions for a writ of certiorari to review the judgment of the Eleventh Circuit.

OPINIONS BELOW

The sentencing hearing at which Judge Steele initially announced his sentence is unreported. (Pet App. 41a-63a). Judge Steele's Order Amending Sentence (Pet. App. 23a-30a), and Judgment In A Criminal Case (Pet. App. 31a-40a), are also unreported. The Eleventh Circuit's decision is reported at 483 F.3d 782. (Pet. App. 3a-22a). The order denying rehearing and rehearing en banc is unreported. (Pet. App. 1a-2a)

JURISDICTION

The Eleventh Circuit issued its opinion on April 6, 2007. Patrick Lett filed a timely petition for rehearing with suggestion for rehearing en banc, which the Eleventh Circuit denied on November 30, 2007. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The principal provisions involved are 18 U.S.C. § 3553(a) and (f). (Pet. App. 65a-69a); 21 U.S.C. § 841(b) (Pet. App. 70a-80a); and Federal Rule of Criminal Procedure 35 (Pet. App. 81a-82a).

INTRODUCTION

Federal district courts impose more than 65,000 felony sentences every year.[1] Inevitably, sentencing judges occasionally commit reversible legal errors in imposing these sentences. Acknowledging that reality, the Federal Rules of Criminal Procedure expressly afford sentencing judges an efficient means (rather than awaiting appellate reversal) to correct such errors when caught quickly. Rule 35(a) provides that "[w]ithin 7 days after sentencing, the court may correct a sentence that resulted from arithmetical, technical, or other clear error." Here, the district court did just that. Based on a misunderstanding of the applicable statutory minimum sentence, Judge William Steele at first mistakenly concluded that he was unable to sentence petitioner Patrick Lett to less than five years' incarceration for a minor, non-violent drug offense. Recognizing within the Rule 35 time period that he had erred in determining the sentencing range, Judge Steele corrected his legal error and imposed a lawful (and lower) sentence according to the terms of 18 U.S.C. § 3553(a).

The Eleventh Circuit reversed, holding that the district judge's conscientious effort to correct his sentencing mistake was improper because the Judge's legal error did not constitute "other clear error" for purposes of Rule 35. In doing so, the Eleventh Circuit adopted an unduly restrictive view of "other clear error" that undermines Rule 35's ability to allow efficient corrections to legally erroneous criminal sentences. The decision below

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[1] See U.S. Department of Justice Bureau of Justice Statistics, Criminal Sentencing Statistics, http://ojp.usdoj.gov/bjs/sent.htm (last visited Feb. 9, 2008).

thus threatens the effective and just operation of the criminal sentencing system, an issue of substantial federal importance given the tens of thousands of sentences entered every year in U.S. District Courts.

Compounding the need for review, the court's decision also conflicts with settled law in other circuits. All courts agree that Rule 35's purpose is to allow a trial judge to avoid the need for appeal where the result of that appeal will be a reversal for resentencing. Rulings from the First, Second, and Ninth Circuits have correctly concluded in comparable settings that any time that a sentencing judge operates under a legal misunderstanding as to applicable sentencing options, such a mistake necessarily constitutes reversible error requiring resentencing (and thus is the type of error allowing correction under Rule 35). The court below in this case, by contrast, concluded that not all such sentencing errors amount to "clear error" allowing for correction through Rule 35(a). Rather, according to the Eleventh Circuit, an error regarding the judge's sentencing authority will be "clear" (and thus subject to efficient correction in the district court) only if binding precedent in a factually indistinguishable case plainly reveals that error.

Finally, the Eleventh Circuit also adopted a novel and misguided "remedy" in the wake of its flawed Rule 35(a) interpretation. It ordered the District Court to impose the initial, erroneous five-year prison term—notwithstanding Judge Steele's conscientious (and unreversed) determination that he had committed error in imposing that sentence, as well as Judge Steele's express finding that only a much shorter prison term was "sufficient but not greater

than necessary" to serve the sentencing purposes Congress set out in 18 U.S.C. § 3553(a). Nothing in the language of Rule 35 or any other statutory provision justifies the Eleventh Circuit's order that the district court now impose a legally erroneous sentence on Patrick Lett.

The Eleventh Circuit's strained interpretation of Rule 35 reverses a "just determination" in this case, while also disrupting Judge Steele's efforts to achieve "simplicity in procedure and fairness in administration," and to "eliminate unjustifiable expense and delay." *See* Fed. R. Crim. P. 2. Because the Eleventh Circuit's ruling creates confusion that will lead to unjust and/or conflicting results in lower courts, this Court should intervene to provide needed guidance as to what constitutes "clear error" under Rule 35(a). Patrick Lett respectfully urges the Court to grant certiorari and reverse the decision below.

STATEMENT

A. Patrick Lett, After Honorably Serving In The U.S. Army For Seventeen Years (Including Two Tours In Iraq), Was Briefly Drawn Into Selling Drugs When Unable to Find Work.

Patrick Lett honorably served his country for seventeen years in the U.S. Army, including serving two tours of duty in Iraq. Unfortunately, for a six-week period following his return from his second deployment in Iraq, Lett departed from what Judge Steele called "an exemplary life." Pet. App. 59a. Having just returned from a war-ravaged country where he saw comrades and friends killed, Lett retired from the service and returned home to rural Alabama. Pet. App. 50a. Within the first month of returning home, however, his father died. When Lett

found himself unable to secure work, and thus unable to support his two daughters, he began drinking heavily. Id.

At this point temptation entered in the form of his cousin Michael Lett, a local drug dealer. Knowing that Patrick needed money to repair his car, Michael offered to pay Patrick for delivering a package. Pet. App. 53a. Lett acquiesced and briefly began working for Michael in a misguided attempt to get back on his feet. Id.

Within six weeks, however, Lett determined that he was on the wrong path, and, pulling himself up by his bootstraps, he ended his relationship with Michael. As Lett later testified, he found that he could not take advantage of someone suffering from the disease of addiction. Pet. App. 50a. Patrick wrote his Congressman asking for assistance in re-entering the military. Id. He re-enlisted and served in exemplary fashion for seventeen months, seemingly leaving his past behind him.

As the court below observed, however, citing William Faulkner: "The past is never dead. It is not even past." Pet. App. 5a. While Lett returned to serve his country, DEA agents were continuing an undercover investigation of Michael's drug operation. In September 2005, the government indicted Michael and many others, including Patrick. Pet. App. 5a-6a. The indictment detailed that, during the short period Patrick worked for Michael, he had on seven occasions sold small amounts of crack cocaine to an undercover agent. Pet. App. 6a.

B. After Lett Accepted Responsibility and Pleaded Guilty, U.S. District Judge William Steele Mistakenly Assessed the Statutory Sentencing Range That Congress Has Authorized for Lett's Offense.

Returning from active service to respond to his indictment, Patrick immediately pleaded guilty and took full responsibility for his, by then, nearly two-year-old crime.

At Lett's sentencing hearing, Judge Steele heard directly from Captain Iannuccilli, Lett's commanding officer during his re-enlistment. Captain Iannuccilli testified that Lett is "an outstanding NCO and soldier," who "displays daily the Army values" of "loyalty, duty, respect, selfless service, honor, integrity [and] personal courage." Pet. App. 45a, 46a-47a. Fellow sergeants who served with Lett, and who made the extraordinary effort to address the district court in person at Lett's initial sentencing, echoed these comments. Pet. App. 47a-49a. And, in perhaps the highest compliment a commanding officer can pay, Iannuccilli stated that:

> I would gladly deploy to Iraq with him and entrust my life to him. I'd trust my soldiers' lives to him. He's been nothing but an exemplary soldier for the past 12 months.

Pet. App. 47a.

Lett also spoke at his sentencing, asking Judge Steele to allow him to return to duty so he could support his family:

> I've been in the military for 17 years, 17 years. I've been in Desert Storm and I went to Iraq, Iraqi Freedom. I'm asking your Honor to let me

> try to continue my career and to take care of my family. That's the most important thing is taking care of my mom and my kids and serving this country.

Pet. App. 52a.

The Presentence Report (PSR) submitted to Judge William Steele calculated a Guidelines sentencing range of 70 to 87 months. Notably, this PSR calculation—which was adopted by the court without objection—found that Lett was eligible for the two-level "safety-valve" reduction provided in U.S.S.G. § 2D1.1(b)(11). Pet. App. 44a. But the PSR failed to make clear that this finding also meant that, under the terms of U.S.S.G. § 5C1.2(a) and 18 U.S.C. § 3553(f), Judge Steele was authorized by Congress to impose a sentence "without regard to [the] statutory minimum sentencing terms" of 21 U.S.C. § 841.

With this flawed PSR in hand, the judge carefully considered the nature and circumstances of the offense, the history and characteristics of the defendant, and numerous other factors. In this process, Judge Steele was clearly impressed by Lett's service record:

> I have someone who has a military career behind him, who since the advent of the offenses in February and March of 2004 has re-entered the military. And based on everything that I've seen in terms of the letters of recommendation and heard today from Sgt. Lett's Captain and First Sergeant and fellow soldier, there's every reason to believe that Sgt. Lett's contributions to the Army and to the military and, in turn, to this country have been substantial not only in terms

> of serving in time of war but serving in times of peace and serving, serving well.

Pet. App. 58a.

In addition to Lett's "substantial contributions" to the "military and, in turn, this country," Judge Steele also noted Lett's complete lack of criminal history. Pet. App. 59a. He specifically found that Lett had led "an exemplary life up until the time of the offenses and even after." Id. According to the judge, the "five or six weeks in 2004 in which Sgt. Lett chose to violate the law" represented "aberrant behavior." Id.

Judge Steele concluded that, in light of Lett's unique circumstances and background, the dictates of 18 U.S.C. § 3553(a) required a sentence below the PSR-calculated range of 70 to 87 months. But, in selecting a specific sentence, Judge Steele made the key legal error at issue in this petition. Lacking proper guidance from the PSR and the parties, Judge Steele incorrectly believed that the statutory minimums set forth in 21 U.S.C. § 841(b)(1)(B) prevented him from imposing a sentence of less than 60 months' imprisonment. In open court, Judge Steele stated that "my discretion is limited by Congress, and my discretion is limited to the mandatory minimum in this case, which is five years. There is no way I can legally go below that five-year mandatory minimum, even if I wanted to." Pet. App. 59a. Accordingly, Judge Steele imposed what he believed at that time to be the minimum sentence permissible by statute—five years' imprisonment. Id.

C. Immediately Recognizing His Legal Error as to the Applicable Statutory Sentencing Range, Judge Steele Corrected Lett's Sentence Pursuant to Rule 35.

Matthew Sinor, a law student who served with Lett in the Army and was present at his sentencing, realized that Judge Steele was legally mistaken about his statutory sentencing authority. Sinor faxed a letter to Judge Steele's chambers inquiring whether Judge Steele had fully appreciated his statutory sentencing authority in light of 18 U.S.C. § 3553(f). (Sinor also faxed copies of this letter to the Assistant U.S. Attorney and the retained defense lawyer involved in Lett's sentencing.)

Judge Steele—quickly realizing that he had erred in thinking that five years was the lowest statutorily authorized sentence, and also knowing that Rule 35(a) provided seven days to correct a sentence that resulted from clear error—promptly corrected his prior erroneous sentence, issuing an "Order Amending Sentence" on April 24, 2006.[2]

In a detailed written opinion, Judge Steele explained that he initially imposed a sentence of 60 months only because he erred with regard to his statutory sentencing authority. Pet. App. 28a. Upon correctly assessing that authority, Judge Steele reiterated that the "sentencing factors contained in 18 U.S.C. § 3553(a)" compelled a conclusion that Lett

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[2] The original sentencing hearing occurred on April 13, 2006 (a Thursday). Under the rules, periods shorter than 11 days do not include intervening weekends. See Fed. R. Crim. P. 45(a)(2). Thus, the seven-day window under Rule 35 included April 24, 2006. The Government has never disputed the timeliness of Judge Steele's sentencing correction pursuant to Rule 35.

"was entitled to a non-guidelines [ ] sentence." Id. Pointing to Lett's "limited role in the offense," his "lack of criminal history" and his "unblemished and significant 17 year career in the U.S. Army including two tours of duty in Iraq," Pet. App. 28a-29a, the Judge determined that Lett should be "sentenced to the time he has now served in the custody of the United States Bureau of Prisons," plus three years of supervised release. Pet. App. 29a. The court further specifically found that this sentence "addresses the seriousness of the offense, and the sentencing objectives of punishment, deterrent [sic], and incapacitation, and constitutes a reasonable sentence following consideration of the sentencing factors in 18 U.S.C. § 3553(a)." Id.

D. The Eleventh Circuit Reversed, Without Even Considering Whether The Court's Initial Sentence Resulted From Legal Error.

The government appealed Lett's sentence, arguing that Rule 35(a) did not allow Judge Steele to amend the sentencing judgment under these circumstances and that the amended sentence was unreasonable. The government asked for the sentence to be "vacated and the case remanded for further proceedings." Brief of Appellant at 19.

Adopting the prosecutor's Rule 35 argument, the Eleventh Circuit reversed the district court's corrected sentence, and did so without reaching the reasonableness issue or even examining whether Judge Steele's initial sentence was infected with legal error. The Eleventh Circuit concluded it need not reach these questions because, even if Judge Steele had committed legal error in determining the sentence for Patrick Lett, the district court had not

committed the type of "clear error" necessary to authorize correcting a sentence under Rule 35. Pet. App. 18a.

To justify its ruling, the Eleventh Circuit decision acknowledged that the Advisory Committee notes regarding "clear error" under Rule 35 speaks of errors that would "almost certainly result in a remand of the case to the trial court for further action" if raised on direct appeal. Pet. App. 14a. But the Eleventh Circuit concluded that the district court's admitted failure to understand "the breadth of its discretion under the safety valve provisions," did not constitute "clear error" even though the panel acknowledged that the misunderstanding likely "caus[ed] the court to impose a sentence higher that it would have had it correctly gauged the law." Pet. App. 16a-17a. According to the court, while the trial court may have legally erred, the error was not "clear" as "[t]here is no decision on point from any court, and reasonable people could differ about" whether the statutory minimum applies, an unprecedented definition of "clear error." Pet. App. 21a.

Adding an imprisonment insult to its legal injury, the Eleventh Circuit rejected the government's requested relief—a remand for further proceedings—and instead decided to order imposition of the initial erroneous sentence that Judge Steele had previously determined he was duty bound to correct. Without any explanation for why it was adopting a Rule 35 "remedy" not even advocated by the government, the Eleventh Circuit simply remanded the case "with instructions that the district court impose the original sentence of sixty months . . . ." Pet. App. 22a.

Lett filed a petition for rehearing with a suggestion for rehearing en banc. In the petition, Lett explained that the panel's ruling conflicted with decisions in other circuits, which have consistently held that errors regarding the range of sentencing authority are per se reversible errors requiring resentencing. On November 30, 2007, the Eleventh Circuit denied, without opinion or explanation, Lett's request for rehearing. Pet. App. 1a. Lett now respectfully urges the Court to grant his petition and reverse the decision below.

REASONS FOR GRANTING THE WRIT

A. The Eleventh Circuit's Decision Conflicts With Sentencing Law From Numerous Other Circuits.

In reversing Judge Steele's corrected sentence, the Eleventh Circuit created multiple conflicts among the circuits regarding what sentencing errors are subject to correction. All courts, including the court below, agree that Rule 35(a) is designed to permit trial courts, within the brief 7-day window the rule specifies, to correct "clear errors," or, in other words, errors that would almost certainly result in the sentence being vacated and remanded if raised on appeal. See Fed. R. Crim. P. 35 advisory committee's notes (1991). In determining what errors fall in that category, settled law in other circuits holds that a defendant has a right to have a sentencing judge determine a sentence based upon a correct view of the statutory options open to the judge. Accordingly, in other circuits that have addressed this type of issue, any sentence imposed when the sentencing judge was operating under misimpression as to the available options results in the sentence being vacated and remanded on appeal—and thus would

meet the agreed definition of "clear error" for Rule 35 purposes. In the Eleventh Circuit, by contrast, the court has defined "clear error" in such a way that only *some* such misimpressions qualify. This creates circuit conflicts and will sow lower court confusion on at three different fronts.

1. **The Decision Conflicts With First And Second Circuit Decisions Regarding Correctable "Clear Errors" Under Rule 35.**

First, the decision below directly conflicts with decisions in the First and Second Circuits regarding the use of Rule 35 to correct sentences that are based on a misunderstanding of the interplay between the sentencing guidelines and statutes. For example, in *United States v. Goldman*, 41 F.3d 785, 789 (1st Cir. 1994), the prosecutor told the court at sentencing that based on the quantity of drugs at issue, the statutory maximum for Goldman was 40 years under 21 U.S.C. § 841(b)(1)(B) (the same sentencing statute at issue here). The court sentenced the defendant to 262 months. Id. In fact, because the defendant had a prior drug conviction, the maximum term was life. The prosecutor informed the court of the mistake within the seven day window, and the court increased the defendant's term by 98 months under Rule 35. Id.

The defendant appealed the adjustment, but the First Circuit held that the sentencing court's misunderstanding as to the applicable statutory maximum constituted clear error. Id. In words that are particularly appropriate here, the First Circuit explained why it should not unduly restrict a district court's "right to correct an unlawful sentence" under Rule 35:

> As for fundamental fairness, it is difficult to see anything unfair about the district court's decision to correct a clear error in a sentence where the error relates solely to the precise length of a lengthy prison term and the correction is made with great promptness. . . . [Such a] correction is surely what the drafters of [Rule 35] had in mind. Given the complexity of the guidelines, the seven-day window is a well-advised precaution and may operate as readily in favor of the defendant as against him.

Id.

Similarly, in *United States v. Waters*, 84 F.3d 86, 90-91 (2d Cir. 1996), the court originally sentenced a defendant to six-months' imprisonment, but failed to realize that, under U.S.S.G. § 7B1.3, the Bureau of Prisons would credit eight months that the defendant had served in state prison against that sentence, meaning that the defendant would be immediately released. The judge determined that he had committed clear error and increased the sentence to fourteen months (so that with the credit the defendant would still serve six months in prison). Id. at 89. In a "candid admission" at resentencing that mirrored Judge Steele's statements in this case, the sentencing judge in *Waters* noted:

> I am concerned about what happened here and the confusion that resulted. I was clearly not aware of the provision of law [under] which this time was credited to the defendant under 3585. . . . I think that at the original time of sentencing . . . I was required to take that into account[] . . . and it was error not to

Id. at 91.

On appeal, the circuit court rejected the defendant's argument that the judge lacked power under Rule 35 to correct the sentence under the circumstances. According to the Second Circuit, the district court's failure to consider U.S.S.G. § 7B1.3 and the way that advisory guideline provision interacted with 18 U.S.C. § 3585(b) (the statutory provision regarding credits for other imprisonment) constituted "clear error." *Waters*, 84 F.3d at 91. The court explained that "[t]he [district] court's resentencing of Waters was not the result of misgivings about the severity or the leniency of the sentence imposed or a 'change of heart' regarding the sentence," id. at 90, but rather resulted from the judge's misunderstanding of the legal provisions impacting the applicable sentencing rules.

The holdings in *Goldman* and *Waters* cannot be squared with the Eleventh Circuit's holding here. Just as in *Goldman*, the sentencing court in this case corrected a sentence that was based on a flawed understanding of the applicable statutory endpoint; just as in *Waters*, the sentencing court here failed to properly account for the interaction between the sentencing guidelines and the applicable statute. And like *Waters*, the judge's own "candid admission" showed that the corrected sentence did not result from a "change of heart," but rather a corrected understanding of the applicable legal rules. Such an error falls neatly within Rule 35's scope as properly interpreted by the First or Second Circuits, but not under the Eleventh Circuit's flawed interpretation of that rule.

2. The Decision Creates A Conflict With The Ninth Circuit On Whether Errors As To Safety-Valve Eligibility Require Resentencing.

The decision below also directly conflicts with the Ninth Circuit's recent decision in *United States v. Mejia-Pimental*, 477 F.3d 1100 (9th Cir. 2007), regarding the impact of a failure to properly understand the impact of safety-valve eligibility. There the sentencing court had incorrectly determined that the defendant was not safety-valve eligible, and thus "sentenced [the defendant] with reference to a mandatory minimum term" that did not in fact apply. Id. at 1102. According to the circuit court in *Mejia-Pimental*, "[e]rrors in the determination of safety valve eligibility *require resentencing*." Id. at 1109 (emphasis added). Indeed, the court said that this is true "even where the district court indicated that it would not have sentenced below the mandatory minimum." Id. The Ninth Circuit went on to explain that "the fact that a district court used the mandatory minimum as a reference point *requires resentencing* if the defendant was in fact safety valve eligible." Id. (emphasis added). The court also explained the reason for this per se resentencing requirement:

> The type of discretion afforded a court that is restrained by a statutory minimum is wholly unlike that afforded one that is not. It is therefore impossible for appellate courts to determine how a district court sentencing under a mandatory minimum might have exercised its sentencing discretion had it not been so constrained.

Id. *Mejia-Pimental* thus reflects a simple (and sound) rule: If the sentencing court erroneously believes that a mandatory minimum applies, the sentence must be vacated on appeal.

The decision below, however, contradicts that rule. The appeals court here acknowledged that Rule 35(a) allows courts to amend sentences that would almost certainly result in remand on appeal. Further, it acknowledged that the trial court may have erred in determining that the mandatory minimum applied, and even that this error likely caused the sentencing judge to impose a higher sentence than he otherwise would have. Pet. App. 16a-17a. The court determined, though, that such an error did not qualify for Rule 35(a) correction, or, in other words, that such an error was not of the type that would almost certainly result in a remand for resentencing on appeal. According to the Eleventh Circuit, it was not enough that Judge Steele erred in determining that the statutory minimum applied, but rather Judge Steele must have transgressed clearly settled binding precedent concerning the application of the statutory minimum before the error qualifies for correction under Rule 35(a).

In short, the Ninth Circuit has concluded that errors in determining whether a mandatory minimum apply are the type of error that requires a remand (and thus would plainly justify self-correction under Rule 35), while the Eleventh Circuit has adopted a contrary approach. Only this Court can effectively resolve which of these mutually exclusive approaches should prevail.

3. The Decision Conflicts With Settled Law Regarding Reversible Sentencing Errors Generally.

The decision below also conflicts with settled understandings among the circuits on a more fundamental level. Before the decision below, one agreed principle of criminal sentencing was that a defendant is entitled to a sentencing judge who "fully appreciate[s] his options." *United States v. Thorpe*, 191 F.3d 339, 344 (2d Cir. 1999) (quoting *United States v. Rivers*, 50 F.3d 1126, 1132 (2d Cir. 1995)). Ensuring that such understanding exists is "a particularly important safeguard when what is really at risk is an individual's liberty." *Thorpe*, 191 F.3d at 344.

Accordingly, appellate courts have uniformly insisted that a sentencing judge have a full and accurate awareness of the lawful sentencing discretion available in formulating a sentence. Thus, while appeals courts review the *exercise* of such discretion under a very deferential standard, where the sentencing judge had an errant view of the *existence* of such discretion, appeals courts have not hesitated to find that such an error *requires* vacating and remanding the sentence. See, e.g., *United States v. Delgado-Reyes*, 245 F.3d 20, 22-23 (1st Cir. 2001) (remanding for resentencing when record suggested sentencing court had an "erroneous view of the law" concerning its departure authority); *Thorpe*, 191 F.3d at 343 (vacating sentence where court was operating under mistaken belief that to sentence defendant to probation it would need to undertake a downward departure); *United States v. Dominguez*, 296 F.3d 192, 196 (3d Cir. 2002) (vacating sentence where trial

court had "misapprehended" precedent and concluded "it lacked discretion"); *United States v. Gardiner*, 463 F.3d 445, 461 (6th Cir. 2006) (vacating and remanding sentence where district court appeared to be "harboring the misapprehension that, under *Booker*, he could not enhance Gardiner's sentence based upon factors that were not determined by the jury beyond a reasonable doubt"); *United States v. Mancari*, 463 F.3d 590, 598 (7th Cir. 2006) (vacating sentence and remanding where the trial judge "appears to have been under the misimpression that its discretion was still cabined by the pre-*Booker* departure jurisprudence"); *United States v. Pierce*, 132 F.3d 1207, 1208 (8th Cir. 1998) (remanding because the district court mistakenly believed that it was required to sentence the defendant to prison). Simply put, all of these circuits recognize a defendant's right to a sentencing judge who is aware of the full range of lawful sentencing options, a breach of which requires a reversal and a remand for resentencing.

The decision below, however, contravenes this settled understanding. As noted above, while the Eleventh Circuit acknowledged that the sentencing judge had the power to self-correct errors that would otherwise result in vacating the sentence on appeal, it concluded that the error here, an error in determining the available sentencing range, did not allow for such self-correction. The irrefutable implication of the decision below is that, in the Eleventh Circuit and only in the Eleventh Circuit, errors as to the available sentencing range—even when coupled with a judge's statement that he would like to go lower but feels constrained—would not necessarily result in vacating the sentence on appeal.

The opinion thus interjects uncertainty into a previously settled area of the law. And such uncertainty is particularly troubling "when what is really at risk is an individual's liberty." *Thorpe*, 191 F.3d at 344

B. The Eleventh Circuit's Interpretation Of "Clear Error" Eviscerates Rule 35's Ability To Serve As The "Efficient and Prompt" Corrective Remedy The Rules Drafters Envisioned.

1. Rule 35(a) Is Specifically Designed To Avoid The Need For Appeal Where The District Judge Quickly Recognizes And Corrects His Own Reversible Sentencing Error.

Not only does the Eleventh Circuit's decision create conflicts among the circuits, but it also reflects a flawed understanding of Rule 35(a). The rule is designed to provide an "efficient and prompt" method for district courts to correct sentencing errors without the need for appeal. See Fed. R. Crim. P. 35 advisory committee's notes (1991). To that end, the Rule provides that, "[w]ithin 7 days after sentencing, the court may correct a sentence that resulted from arithmetical, technical, or other clear error." Fed. R. Crim. P. 35(a). And consistent with Rule 35(a)'s goal, the drafters specifically state that "clear error" includes those "errors which would almost certainly result in a remand of the case to the trial court for further action" if an appeal were taken. See Fed. R. Crim. P. 35 advisory committee's notes (1991). Given the tens of thousands of sentences that federal courts impose every year, the need for this type of efficient and prompt alternative to a slow and costly appeal is obvious (and is a corrective mechanism regularly

used by federal prosecutors to correct sentences erroneously set too low).

Unfortunately, the Eleventh Circuit's flawed view of "clear error" eviscerates Rule 35's ability to serve its intended function. The Eleventh Circuit's decision essentially creates two different kinds of reversible sentencing errors. Under the Eleventh Circuit's decision, only those reversible errors demonstrated by binding precedent clearly on point, or otherwise entirely beyond debate, are correctable through Rule 35, leaving other reversible legal errors to be corrected after the expense and delay of a needless appeal. Creating such a distinction in reversible sentencing errors prevents Rule 35 from serving as the "efficient and prompt" alternative to correction on appeal that it was intended to be.

2. The Error Here Fits Well Within Rule 35(a)'s Scope, And The Eleventh Circuit Erred In Concluding Otherwise.

At Lett's initial sentencing, Judge Steele made a fundamental legal error concerning his statutory sentencing authority: He failed to appreciate that in Lett's circumstances, 18 U.S.C. § 3553(f) authorized the judge to impose a sentence "without regard to [the] statutory minimum sentencing terms" of 21 U.S.C. § 841. Instead, the judge mistakenly believed that 21 U.S.C. § 841(b)(1)(B) *prevented* him from imposing a sentence lower than 60 months in prison. Reflecting this, at Lett's initial sentencing, Judge Steele stated "my discretion is limited by Congress . . . to the mandatory minimum in this case, which is five years." Pet. App. 59a.

It is undisputed, however, that Lett satisfied the "safety-valve" requirements of § 3553(f). Indeed, the

PSR expressly stated that Lett met the elements of U.S.S.G. § 5C1.2, see Pet. App. 44a, which merely restate, verbatim, the statutory safety-valve requirements. *Compare* U.S.S.G. § 5C1.2 *with* 18 U.S.C. § 3553(f). Given that Lett met these requirements, Judge Steele's discretion clearly was not limited in the manner he thought. For defendants like Lett who meet the safety-valve requirements, Congress provides a statutory sentencing range of 0 to 40 years' imprisonment, not the 5 to 40 year range that Judge Steele erroneously believed was controlling during the initial sentencing hearing.

Neither the government nor the Eleventh Circuit decision below disputes that Lett meets the safety valve criteria set forth by Congress. Rather, to assail the corrected sentence imposed by Judge Steele, the government has argued and the Eleventh Circuit has adopted a novel interpretation of "clear error" under Rule 35. According to the court below, it did not matter whether Judge Steele had in fact made a legal error concerning his statutory sentencing authority;. Rather, because the Eleventh Circuit thought the error was arguable, then the district judge lacked authority under Rule 35 to correct the legal error he had come to identify. Pet. App. 18a. But there is no reason to believe that Rule 35(a) is designed to prevent a legally erroneous sentencing determination from being corrected whenever the legal error is subject to debate by a clever federal prosecutor or defense attorney seeking to insulate a legally erroneous sentence from ready correction. Indeed, unless this Court disagrees with Judge Steele's conclusion that he initially made a legal error concerning his statutory sentencing authority, the purposes of Rule 35(a) are very poorly served by the

Eleventh Circuit's declaration that Judge Steele was not permitted to correct the legal error that he quickly acknowledged. When a district court quickly realizes a significant legal error concerning its sentencing authority, it is both efficient and wise for that court to amend its sentencing judgment within the seven-day period provided for under Rule 35(a) rather than create the necessity for an appeal to achieve a legally sound sentencing outcome.

Ultimately, the Eleventh Circuit ruling seems based on a misplaced concern about Rule 35(a) becoming a device to prompt district courts to act on a change of heart regarding their discretionary sentencing determinations. But the record below shows that there was no change of heart here—throughout the proceedings, the judge consistently determined Lett's extraordinary personal history, his exemplary military service, and his "limited role in the offense," 18 U.S.C. § 3553(a), required a below-guideline sentence, and consistently determined that the shortest legally available term of imprisonment would be appropriate. Stated simply, Judge Steele never changed his mind about the appropriate sentence for Patrick Lett. Judge Steele simply erred initially in determining what that legally-minimum sentence was. This case represents precisely the kind of "clear error" the Rule is designed to allow sentencing judges to correct.[3]

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[3] The Eleventh Circuit decision below hints that Judge Steele's sentencing correction involved a reinterpretation of U.S.S.G. § 5C1.2, a provision of the sentencing guidelines which reiterates a district court's statutory authority under 18 U.S.C. § 3553(f) to impose a sentence "without regard to [the] statutory minimum sentencing terms" in certain cases. But Judge Steele's corrected sentence and the error he made at the initial

Especially because the Eleventh Circuit has not contradicted Judge Steele's ultimate conclusion that he initially made a legal error concerning his statutory sentencing authority, it is hard to understand what legal or practical value the Circuit's approach to Rule 35(a) furthers. The whole point of Rule 35(a) is provide a brief window of time within which district judges may correct legally erroneous sentencing determinations so that neither the Government nor the defendant is forced to seek appellate relief to correct a legal error that has a consequential impact on the sentence imposed. A sentencing appeal can often take a year or more to be fully briefed and adjudicated at the appellate level—indeed, nearly two years have now elapsed since the 2006 imposition of Lett's sentence by Judge Steele—but the Eleventh Circuit has now interpreted Rule 35 to create a class of sentencing errors that can only be

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(continued...)

sentencing did not turn on any guideline provision: the fundamental legal error that Judge Steele quickly corrected concerned his statutory sentencing authority in light of 18 U.S.C. § 3553(f), the statutory safety valve provision.

Moreover, the Eleventh Circuit has itself previously indicated that a district court's initial sentencing pursuant to the wrong guideline could be corrected as "other clear error" pursuant to the authority provided in Rule 35(a). See *United States v. Yost*, 185 F.3d 1178, 1179 (11th Cir. 1999). Logically, the same rule can and should apply if and when a district court's initial sentencing ruling was pursuant to the wrong statutory sentencing range. Indeed, the only obvious distinction between this case and *Yost* is the fact that in *Yost* the sentencing correction approved by the Eleventh Circuit *increased* the sentence given to the defendant pursuant to the prosecutor's request, whereas in this case the disapproved sentencing correction *decreased* the sentence given to the defendant.

corrected by a circuit court through a time-consuming and costly appeal rather than by the "efficient and prompt," "good faith" efforts of a district judge. See Fed. R. Crim. P. 35 advisory committee's notes (1991) (Rule 35 is designed to provide "efficient and prompt" alternative to appeal); Pet. App. 21a (trial court acted in "good faith" in imposing corrected sentence).

Consequently, unless corrected, the Eleventh Circuit's approach to Rule 35(a) will require both the Government and criminal defendants to resort to the costly and laborious appellate process in many cases in which a clear sentencing error could be readily corrected immediately by the district court. There is, of course, no shortage of sentencing appeals concerning contested legal issues; Rule 35(a) should not be applied in a manner that requires the parties to further clutter the appellate courts with matters involving errors that can and should be dealt with expeditiously at the district court level.

C. The Eleventh Circuit Improperly Ordered The District Court To Impose A Long Prison Sentence On Patrick Lett That The District Court Determined Was Legally Erroneous Without Clarifying Whether That Sentence Was In Fact Erroneous.

The flaws in the Eleventh Circuit's Rule 35(a) analysis also extended to the remedy it ordered. On appeal, the government had expressly asked to have Lett's sentence "vacated and the case remanded for further proceedings." Brief of Appellant at 19. However, after holding that Rule 35(a) did not permit correction of Judge Steele's initial sentencing error, the Eleventh Circuit remanded the case "with instructions that [the district court] impose the

original sentence of sixty months . . . ." Pet. App. 22a. This unusual mandate requiring Judge Steele to impose a specific prison sentence on Patrick Lett finds no support in the language of Rule 35 or any statutory provision. Significantly, if the Eleventh Circuit's suspect sentencing order is allowed to stand, new and challenging procedural, statutory and constitutional questions arise.

Before the Eleventh Circuit, the government argued that Lett's below-guideline sentence was unreasonable, and it seems unlikely that the government would have appealed Lett's corrected sentence were it not concerned about the substantive reasonableness of the sentence Judge Steele decided was appropriate. Moreover, the government specifically requested the remedy of a "remand[] for further proceedings" because it likely appreciated that, even if Lett's corrected sentence were held to be unreasonable on appeal, new and complicated statutory and constitutional issues could arise if Judge Steele were ordered to impose a sentence of 60 months on Patrick Lett given the facts found and legal conclusions reached during the initial sentencing proceedings in the district court.

Significantly, the issues and questions raised by the Eleventh Circuit's sentencing order are greatly complicated following the U.S. Sentencing Commission's decision to lower all guideline sentences for crack cocaine offenses effective November 1, 2007,[4] and the Commission's subsequent decision to make this change apply

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[4] See U.S. Sentencing Commission. Amendments to the Sentencing Guidelines (May 11, 2007), *available at* http://www.ussc.gov/2007guid/may2007rf.pdf, at 72.

retroactively as of March 3, 2008.[5] Among other consequences, the new crack guidelines converts a 60-month sentence for Patrick Lett, which was a below-guideline sentence when first announced by Judge Steele, into a within-guideline sentence (and not even a sentence at the bottom of the now applicable guideline range). As detailed above, based on Lett's extraordinary personal history, his exemplary military service, and his minor role in the offense, Judge Steele has consistently determined that 18 U.S.C. § 3553(a) demands a below-guideline sentence for Patrick Lett because a within-guideline sentence would be "greater than necessary" to achieve the purposes of sentencing detailed in § 3553(a)(2).[6]

Had the Eleventh Circuit addressed whether Lett's corrected below-guideline sentence was unreasonable

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[5] See U.S. Sentencing Commission, December 11, 2007 Promulgated Amendment (Dec. 11, 2007), *available at* http://www.ussc.gov/2007guid/030308rf.pdf (retroactivity provision); U.S. Sentencing Commission, U.S. Sentencing Commission Votes Unanimously to Apply Amendment Retroactively for Crack Cocaine Offenses (Dec. 11, 2007), *available at* http://www.ussc.gov/press/rel121107.htm (sentencing commission news release regarding retroactivity).

[6] It is informative to compare the facts and results here with the Court's recent sentencing decision in *Gall v. United States*, 128 S. Ct. 586 (2007). In *Gall*, the Court upheld a sentence of probation for defendant Brian Gall who, after playing a large part in a drug conspiracy for over half a year while in college, voluntarily withdrew from the conspiracy and started leading a law-abiding life. Id. at 591-93. In this case, the Eleventh Circuit has now ordered the imposition of a five-year prison term on Patrick Lett who, after playing a small part in a drug conspiracy for a few weeks after having served 17 years in the U.S. Army, voluntarily withdrew from the conspiracy and returned to honorable military service.

as the government had urged, its decision to order the district court to impose a specific sentence might make some sense. But, critically, the Eleventh Circuit decided not even to address the reasonableness of Judge Steele's substantive sentence judgments and did not examine the sentencing instructions of 18 U.S.C. § 3553(a) in any way. (Indeed, the panel's sympathetic discussion of Lett's personal history tacitly suggests that the panel saw considerable merit in Judge Steele's conclusion that the § 3553(a) factors required a below-guideline sentence.) Showing a peculiar and problematic disinterest in considering substantive sentencing law, the Eleventh Circuit decided to focus exclusively on Rule 35(a) particulars, but then the panel disregarded the government's suggested Rule 35 remedy without providing any reasoned account for whether or why either the initial 60-month sentence or the corrected shorter sentence would be legally sound.

Tellingly, when ordering a sentence that Judge Steele had previously determined to be statutorily improper, the Eleventh Circuit did not reference—and really could not possibly cite—any statutory provision or other legal authority to justify its novel "remedy" or the imposition of a specific sentencing term in the district court. Indeed, because Judge Steele expressly found that a 60-month sentence of imprisonment would be "greater than necessary" to achieve the purposes of sentencing Congress set out in § 3553(a)(2), and because the Eleventh Circuit has not disturbed or even questioned this key finding, the Eleventh Circuit's sentencing order arguably requires Judge Steele to transgress congressional sentencing instructions and his judicial oath.

Moreover, beyond the new crack guideline complications and statutory authority concerns, ordering the imposition of 60 months' imprisonment on the unique facts of this case raises serious constitutional problems. To order that a defendant receive an unnecessarily long term of imprisonment due to alleged procedural errors—errors based in the district court's own mistake about its sentencing authority which it tried to remedy—raises serious issues under the Due Process Clause and the Cruel and Unusual Punishments Clause. *Cf. Atkins v. Virginia*, 536 U.S. 304, 319 (2002) (explaining that, when a severe punishment fails to "measurably contribute[to proper sentencing goals], it is nothing more than the purposeless and needless imposition of pain and suffering, and hence an unconstitutional punishment" (citation and punctuation omitted)); *Williams v. New York*, 337 U.S. 241, 247 (1949) (suggesting possible due process problems with "rigid adherence to restrictive rules" that may prevent judges from considering "pertinent information" at sentencing). Moreover, given the deficient performance of Lett's initial trial counsel and the prosecutor in this case—both of whom contributed to Judge Steele's legal confusion by erroneously suggesting he could not impose a sentence of less than 60 months' imprisonment—the Eleventh Circuit's imposition of the original erroneous 60-month prison sentence may trigger distinct constitutional issues under the Fifth and Sixth Amendments. *Cf. Townsend v. Burke*, 334 U.S. 736, 740-41 (1948) (finding a due process violation when the sentencing process was impacted by the "prosecution's submission of misinformation to the court or was prejudiced by the court's own

misreading of the record"); *Glover v. United States*, 531 U.S. 198, 202-05 (2001) (explaining that "counsel's failure to object to an error of law affecting the calculation of a sentence" could constitute ineffective assistance of counsel).

Critically, this Court need not—and should not explore all the complicated guideline, statutory and constitutional implications of ordering the imposition of an excessive and unnecessary sentence of 60 months' imprisonment for Patrick Lett in light of the unique facts of this case. Rather than rule on these matters, this Court can and should simply recognize that, as the government itself has suggested, even if Judge Steele lacked authority to correct his initial sentence, it is improper to order Judge Steele to now impose a sentence of 60 months imprisonment upon remand. Consequently, this Court should, at the very least, summarily reverse this aspect of the Eleventh Circuit's ruling and order this matter remanded for further proceedings in the district court, a holding that would accord with the government's own express request for relief when it initiated an appeal from Lett's corrected sentence nearly two years ago.

CONCLUSION

For the above reasons, Petitioner Patrick Lett respectfully requests that the Court grant certiorari and reverse the decision below.

Respectfully submitted,

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February 12, 2008